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No. 80-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITIZENS AGAINST RENT CONTROL/ COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' REPLY BRIEF

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ARGUMENT

A. Limitations on Contributions to a Ballot Measure Committee Directly and Substantially Restrain the Exercise of Speech and Associational Rights.

Appellees' Brief does not meet the issue before the Court. There can be no dispute that section 602 of the Berkeley Election Reform Act of 1974, Berkeley, Cal. Ordinance 4700-N.S. (June 4, 1974) (the Ordinance), in limiting to $250 the right of contribution to a ballot measure campaign committee, directly impinges upon the constitutional guarantees of freedom of speech and assembly, and must give way unless, under exacting scrutiny, it is proved to serve in the least restrictive way possible some governmental interest so compelling as to require overriding those guaranteed rights.

There is no argument that a contribution to a campaign committee which will express to the electorate opinions about a ballot measure is a form of speech, and that joining with others in providing means to express such opinions is association guaranteed by the Constitution.

> As we have seen, group association is protected because it enhances "[e]ffective advocacy."... The right to join together "for the advancement of beliefs and ideas,"... is diluted if it does not include the right to pool money through contributions, for funds are often essential if "advocacy" is to be truly or optimally "effective."

Buckley v. *Valeo*, 424 U.S. 1, 65-66 (1977) (quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)). These are among the most precious and jealously guarded rights of citizens.

The right to speak implies the right to be heard. With an electorate of tens of thousands of voters in Berkeley, a single effort to convey one's views to the electorate on any measure requires at a minimum a sizable advertisement in a newspaper of wide circulation, a general mailing, a radio speech, or television time. Such communications require substantial

funds. A campaign sufficient to win the attention of the voters and to express the facts, views and reasons of the speaker may well require extensive use of all these media. In today's context, to limit one's "voice" to $250 is to stifle it. [1]

Ballot measures may be clear and simple, or they may be complex in both structure and application. To present one's side on a ballot measure issue requires research, analysis, fact-gathering and publication which most persons can effect only through a committee; otherwise the ability to persuade the electorate may be lost. If contributions are limited much valuable information which a campaign committee could provide concerning the purpose, meaning and application of a ballot measure may remain unpublished. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 n. 21 (1978). Yet, the voters have a vital need for all available information lest they vote blindly or be constrained not to vote at all.

The "active, alert responsibility of the individual citizen in a democracy for the wise conduct of government"—an interest of the highest importance, *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 788-89 (quoting *United States* v. *Automobile Workers,* 352 U.S. 567, 575 (1957)),—is ill-served by impairing the ability of others to reach citizens with their information and views on the subject to be voted on.

> This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.". . .

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[1] Contrary to appellees' contention, the record establishes that appellants' exercise of first amendment rights was substantially affected by the Ordinance here. Just twenty days before the election appellees ordered appellant, Citizens Against Rent Control (hereinafter CARC), to forfeit to the Berkeley treasury $18,600 collected in excess of the Ordinance limitation. CARC submitted uncontroverted evidence that those funds were necessary for CARC "to present comprehensive economic, technical and statistical data to the voters" of the social and economic effects of Measure B, and that CARC's remaining funds were "insufficient to communicate this information to the voters." Joint Appendix (Jt. App.) at 34-35. In granting a temporary restraining order the trial court found that appellants had shown that such a forfeiture would cause irreparable injury. Jt. App. at 41; CAL. CODE CIV. PROC. § 526.

Buckley v. *Valeo*, 424 U.S. at 14 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)).

The Ordinance further severely restricts the associational rights of those who do not contribute more than $250 but who desire to pool their resources with those who would contribute more than the limit. The Ordinance also substantially harms those who have sufficient funds to contribute more than the limit but not enough resources or commitment to conduct an effective campaign independently from all others. For example, in 1977, a single mailing to each of Berkeley's registered voters cost $12,800.[2]

Here the limitation is not "marginal," but crushing. The first amendment declares that the named freedoms shall not be infringed; this Ordinance strikes at the heart of first amendment guarantees which are of special importance in connection with direct voting on ballot measures.

B. That the Ordinance Leaves Open Other Avenues of Communication Is Irrelevant.

The suggestion in Appellees' Brief that the Ordinance leaves other avenues of communication open misses the point. The fact that independent expenditures are not limited, that there is no prohibition against personal services in connection with an election, and that no limit is placed on the amount which campaign committees may collect and spend as long as each individual contribution is $250 or less are all immaterial. Appellees' Brief at 13-18. It is not what Berkeley has left available for persons to say and do, but what it has taken away. The crucial question is: Do the limitations in the Ordinance impair the freedoms of speech and association which the first amendment protects? To this question the answer is clearly yes.

Berkeley's contention that the Ordinance permits citizens to spend more than $250 for or against a ballot measure and associate with a committee is misleading. Appellees' Brief at

[2] Jt. App. at 32. The largest contribution to CARC was $5,000. BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION, REPORT ON CAMPAIGN SPENDING IN BERKELEY BALLOT MEASURE CAMPAIGNS 1977-1980 (May 1981) at 5.

13-14. Berkeley fails to mention that "unlimited" expenditures must be made without any planning, coordination or pooling of resources whatsoever with any other person or committee that shares the spender's beliefs, otherwise they are deemed to be contributions subject to the Ordinance. Ordinance sections 205, 206 and 219, Jurisdictional Statement Appendix (J.S. App.) at A-60-63. Thus the Ordinance diminishes the right of citizens who want to spend more than $250 to join and to advocate as a group their political beliefs and thereby reduces the effectiveness of those efforts. *See NAACP* v. *Alabama,* 357 U.S. 449, 461-63 (1958).

C. Section 602 Serves No Compelling Governmental Interest.

1. The true compelling governmental interests in this case support overturning the Ordinance.

No imminently threatened compelling governmental interest is served by the Ordinance. Rather, the societal interests in protecting the unrestricted right of anyone to communicate fully opinions, reasons and supporting data regarding a ballot measure to the voters and the right to associate with others in effecting that purpose, as well as the right of potential voters to receive the full benefit of all opinions and reasons which might influence their voting decisions, are the compelling interests in this matter.

2. The justification for limits on contributions in candidate campaigns is not present in ballot measure campaigns.

Appellees cannot rely on *Buckley's* sanction of candidate contribution limits which serve the compelling governmental interest of preventing corruption or the appearance of corruption of public officeholders caused by large contributions. The "evil" found in *Buckley* was not the accomplishment of speech to other voters which substantial contributions make possible, but rather the actual or potential corrupting influence which large contributions may have upon the candidate-recipient.

The differences between candidate and ballot measure campaigns, in terms of compelling societal interests, are dramatic and conclusive. One who contributes lavishly to a

political candidate may do so in expectation that that candidate, if elected, will pay off his or her "obligation" to the contributor by acting in the contributor's favor in future matters; in other words, this lavish contribution is an appeal to the venality of the individual politician and an attempt to buy the candidate's allegiance. In simple terms, large contributions might buy a politician's future favors but a ballot measure cannot be corrupted.

> The risk of corruption perceived in cases involving candidate elections, *e.g., United States* v. *Automobile Workers, supra; United States* v. *CIO, supra,* simply is not present in a popular vote on a public issue.

First National Bank of Boston v. *Bellotti,* 435 U.S. at 790.

A ballot measure is a present, conclusive proposition on which the public votes "yes" or "no." The electorate who adopt it obtain exactly what it says, no more or less. It is inanimate; it cannot take future actions and make future judgments. The potential corruption and denigration of the electoral process which might be observed in a political candidacy simply does not exist in the context of a ballot measure. Every decision, save that of the court below, which involves limitations or prohibitions on ballot measure contributions, as distinguished from contributions to candidates for public office, emphasizes this distinction and strikes down prohibitions and limitations upon contributions to ballot measure campaigns.[3] The contribution—the advocacy—in the latter case is directed toward the voters themselves, relating to a specific issue to be decided by their votes at a forthcoming election. In this area the most complete and uninhibited freedoms of association and speech are the very foundation stones of a democratic society.

Berkeley's reliance on *California Medical Association* v. *Federal Election Commission,* ____U.S.____, 101 S. Ct. 2712 (June 26, 1981) is also falacious. CMA upheld limits on

[3] *See* First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980) *appeal docketed* No. 80-970 (Dec. 8, 1980); Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3 (1976); C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978); Schwartz v. Romnes, 495 F.2d 844 (2nd Cir. 1974); *see also* Appellants' Brief at 19-23. The decisions of the California Court of Appeal and the Alameda County Superior Court are in accord.

contributions to multi-candidate political committees; it did not involve or even discuss contributions to ballot measure committees. Central to the *CMA* opinion was that the challenged restrictions prevented circumvention of candidate contribution limits upheld by *Buckley*; such a rationale clearly is not applicable to the case at bar. Moreover, *CMA* expressly declined to decide whether the first amendment would tolerate limits on "the amount individuals could *jointly expend* to express their political views . . ." and concluded that the issues before it were "distinguishable from expenditures made jointly by groups of individuals in order to express common political views." *Id.* at 2722 n. 17 (emphasis added).

3. Appellees' claims that the Ordinance is necessary to overcome "voter apathy" and to encourage participation in the election process have no substance.

Appellees argue that campaign contributions of more than $250 contribute to "voter apathy" and that curtailment of contributions would enlarge public discussion and participation in the political process and "preserve the integrity of the initiative." These arguments are unproven speculation at most; worse, they are inherently self-contradictory. Appellees illogically assert that if the effective promulgation of campaign views is limited, the voters will be more interested and will participate in the election process more widely. The common sense, realistic view of causes and effects is that unrestricted publication of views, facts and reasons tends to *increase* voter interest and participation.

When distilled, appellees' paternalistic argument is that government should determine the best way for political associations to be formed, political speech to be communicated and political campaigns to be conducted. That concept is foreign to the first amendment.

Moreover, Berkeley's claims that the Ordinance maintains the viability of the initiative process and encourages citizen participation in the political process, Appellees' Brief at 6, have been rejected by this Court in *First National Bank of Boston* v.

Bellotti, 435 U.S. at 787-88 and 790 n. 29, and by every other appellate court to consider prohibitions on ballot measure contributions.[4] The effect of circumscribing ballot measure contributions is to restrain certain persons from effectively communicating their views to the electorate and thereby to influence the outcome of elections. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley* v. *Valeo,* 424 U.S. at 48-49. "[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it: . . ." *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 790.

Appellees' Brief fails to discuss how or why its asserted interests are "imminently threatened" either by unlimited contributions or by any other alleged evil.[5] Appellees must establish that the Ordinance serves compelling interests which are imminently threatened by appellants' speech and association. *See First National Bank of Boston* v. *Bellotti,* 435 U.S. at 789. Yet, Berkeley merely recites selective statistics in an attempt to show that fewer people are voting now than in certain years past. Such recitation does not establish the existence of a threat to the initiative process. Indeed the initiative has flourished in the past decade and its usage has dramatically increased.[6] Actually, the extent and degree of voter participation fluctuates greatly and is affected by many factors including the timing of candidate elections, socioeconomic conditions, personal predispositions such as party affiliation and personal ideology, and liberal and conservative voting trends.[7]

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[4] These decisions are reviewed in Appellants' Brief at 19-23; *see also* note 3, *supra.*

[5] The California Supreme Court also failed to mention how Berkeley satisfied this crucial element of strict scrutiny which is deeply rooted in judicial precedent and stems from *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969) and *Thomas* v. *Collins,* 323 U.S. 516 (1945): "[A]ny attempt to restrict those [first amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger." 323 U.S. at 530.

[6] *See* Appellants' Brief at 28 n. 20.

[7] *See* Appellants' Brief at 26 n. 10.

Elimination of voter apathy simply cannot be linked to contribution limits. Berkeley's statement that "[e]very study shows a steady decrease in voter turnout . . ." is inaccurate and its citation of the Census Bureau's *Statistical Abstract of the United States* as showing that "[s]ince 1960 voter turnout in presidential elections steadily declined from 62.8% to 51.8%" in 1980 is misleading.[8] Appellees' Brief at 7 n. 4. The statistics presented by appellees do not accurately reflect the voting pattern. Appellees chose as their starting point the 1960 Kennedy-Nixon election, the year of the highest voter turnout in a presidential election since 1932. The complete statistics show that during the past fifty years there has been an erratic pattern of voter turnout but little net substantive change. Voter turnout in presidential elections was as follows:

1932	52.4%
1936	56.9%
1940	58.9%
1944	56.0%
1948	51.1%
1952	61.6%
1956	59.3%
1960	62.8%
1964	61.9%
1968	60.9%
1972	55.5%
1976	54.3%
1980	52.5%[9]

Appellees also cite statistics purporting to show that Berkeley voter participation decreased from 65.9% in April 1973 to 45.6% in April 1981. Appellees' Brief at 7. These statistics have been discriminately selected and do not accurately reflect voter turnout in Berkeley. For example, in the 1953 Berkeley municipal election there was only a 38.8% voter turnout; in

[8] Berkeley's figure of 51.8% for 1980 is incorrect.

[9] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 511 (1980). The STATISTICAL ABSTRACT tabulates the statistics for participation in presidential elections since 1932.

1957, a 42.7% turnout; in 1963, 83.3%; and in 1979, 43.1%.[10] Even Berkeley's deployment of statistics fails to demonstrate the requisite nexus between the Ordinance and any compelling governmental interest.[11]

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[10] Official voter turnout statistics are on file with the office of the City Clerk, Berkeley, California.

[11] Berkeley's citation of statistics that statewide (California) contributions by individuals decreased by 58% between the 1978 and 1980 general elections is also misleading. Appellees' Brief at 7. The November 1978 statewide ballot contained three highly controversial issues concerning smoking in public and private places, homosexual rights and capital punishment. In contrast, the November 1980 statewide ballot presented only one controversial measure. The ratio of contributions in 1978 to 1980 reflects three times as many hotly contested issues on the ballot in 1978; it is no indication of any diminution of interest in or apathy toward the initiative process. CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, NOVEMBER 7, 1978 GENERAL ELECTION G-1 *et seq.*; CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, NOVEMBER 4, 1980 GENERAL ELECTION F-1 *et seq.*

Appellees' allegation that voters tend to reject ballot measures is of no constitutional significance. Appellees' Brief at 11. It is well known that voters tend to reject changes in the status quo embodied in ballot measures which are lengthy, complex, complicated and of uncertain effect. Brestoff, N., *The California Initiative Process: A Suggestion for Reform*, 48 SO. CAL. L. REV. 934-37 (1975).

Appellees also selectively cite certain statistics concerning nineteen Berkeley ballot measure campaigns between 1977 and 1980. Appellees' Brief at 13 n. 29. Contributions over $250 were made in six of the nineteen campaigns; of the remaining thirteen, there were no registered committees (or money spent) with respect to six non-controversial measures, and in five other campaigns money was spent on one side only. Thus, contributions exceeded the $250 limit in six of eight contested campaigns between 1977 and 1980. Interestingly, the side spending the most money was successful in only three of the six contested elections in which contributions exceeded $250.

The side spending the most prevailed as follows:

Year	Issue	Result
1977	Measure B (pro-rent control)	Failed
1979	Measure A (S. African investments)	Passed
1980	Measure E (library relief)	Passed

The side spending the most "lost" as follows:

Year	Issue	Result
1978	Measure I (pro-rent control)	Passed
1978	Measure J (renter property tax benefit)	Failed
1980	Measure D (pro-rent control)	Passed

BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION, REPORT ON CAMPAIGN SPENDING IN BERKELEY BALLOT MEASURE CAMPAIGNS 1977-1980 (May 1981) at 4, 13-18, 25, 29-31.

It is intolerable even to suggest that the exercise of first amendment rights is subject to influences that change frequently and unpredictably. Moreover, if statistics show anything at all, it is that voter behavior is unpredictable and influenced by many factors. Voter turnout statistics cannot be used to justify ballot measure contribution limits.

Appellees also attempt to justify the Ordinance on the ground that it would promote citizen involvement in the initiative process. Not only is such argument illogical (*see* page 6, *supra*), but this Court has specifically rejected the claim that the first amendment may be subordinated to an asserted governmental interest of promoting citizen involvement in the ballot measure process:

> Appellee contends that the State's interest in sustaining the active role of the individual citizen is especially great with respect to referenda because they involve the direct participation of the people in the lawmaking process. But far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for " 'the widest possible dissemination of information from diverse and antagonistic sources.' " *New York Times Co.* v. *Sullivan,* 376 U.S., at 266 (quoting *Associated Press* v. *United States,* 326 U.S., at 20).

First National Bank of Boston v. *Bellotti,* 435 U.S. at 790 n. 29.

4. Contribution limits are not the least restrictive means to regulate campaign disclosure.

Appellees cannot justify the Ordinance on the ground that it promotes disclosure. Much of Berkeley's argument emphasizes the need—if fairness in the election process is to be preserved—for prompt disclosure of the names of large contributors, and for regulating the "high-sounding" and "patriotic" names sometimes adopted by political committees. Appellees' Brief at 21-22 and 24-25; *see also* Brief of Santa Monica, California, as Amicus Curiae in Support of Appellees at 8, 13 and 18. Yet, the portion of Ordinance 4700-N.S. here challenged addresses neither of these evils. The remedies for secret

contributions and deceptive names are to require disclosure and accuracy—not to eliminate political committees or to restrict contributions. Virtually the same argument that such "disclosure" is a compelling interest was rejected by a unanimous Fifth Circuit Court of Appeals in *Let's Help Florida* v. *McCrary*, 621 F.2d 195 (5th Cir. 1980) *appeal docketed* No. 80-970 (Dec. 8, 1980).

Berkeley does not expressly claim that its existing disclosure laws are inadequate even though it implies such by arguing that campaign committees often have titles that mask the true identity of contributors. Appellees' Brief at 21-22.[12] The State of California and the City of Berkeley already have perhaps the most stringent disclosure-requirement laws in the country.[13] Ordinance section 112, J.S. App. at A-58; *see also* Appellants' Brief at 28. Nevertheless, if Berkeley desires, it can solve any alleged disclosure problem without infringing upon the rights of speech and association. For example, Berkeley could regulate, as Congress has done,[14] the titles chosen by campaign committees or require more frequent pre-election publication of the identities of all major contributors to such committees. *Let's Help Florida* v. *McCrary*, 621 F.2d at 200-01; J.S. App. at A-98-99. Berkeley's interest in promoting disclosure of contributions does not justify stifling its citizens' rights of speech and association.

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[12] *See also* Brief of Santa Monica, Cal., as Amicus Curiae in Support of Appellees at 13-15; Brief in Support of Appellees by Amicus Curiae of City and County of San Francisco at 1-4 and 30.

[13] *See* CAL. GOV'T CODE §§ 84100 *et seq.* and 84200 *et seq.*

[14] See, *e.g.*, 2 U.S.C. § 432(e)(5) (Supp. 1981) and 11 C.F.R. § 102.14(c) (1981).

CONCLUSION

Appellants respectfully submit that the judgment of the court below is erroneous and should be reversed.

Respectfully submitted,

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